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In the Supreme Court of the United States.

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S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AND F. R. COUDERT, as Receivers of the Union Pacific Railway Company,

Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS, et al.,

Defendants in Error.

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No. ~~[illegible]~~ OCTOBER TERM, 1899.

BRIEF OF DEFENDANT IN ERROR, CITY.

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City Attorney.

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THE LANE PRINTING CO., KANSAS CITY, KANSAS.

IN THE

Supreme Court of the United States.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AND F. R. COUDERT, as Receivers of the Union Pacific Railway Company,

Plaintiffs in Error,

vs.

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Defendants in Error.

No. 790. OCTOBER TERM, 1899.

BRIEF OF DEFENDANT IN ERROR, CITY.

Kansas City, Kansas, defendant in error, is a city of the first class, having a population of over 30,000. It was formed by a consolidation of three cities situated so that lines drawn connecting them form a triangle. Situated at a point almost in the center of this triangle, the Union Pacific Railway Company ownes three tracts of land, aggregating about 170 acres, used in part for

shops and other railway purposes and in part vacant. This land situated almost in the center of the city was attempted to be taken into the corporate limits in 1887. The company resisted and on appeal to the Supreme Court of Kansas it was held that under the then existing laws the city could not take the Union Pacific lands into the city against the protest of the company.

U. P. Ry. Co. vs. Kansas City, 42 Kansas, 497.

At the session of the Kansas legislature in 1891 the law given in full in the brief of plaintiff in error, page 2, was passed, providing a more satisfactory way for taking property into cities of the first class and repealing the former law, under which Kansas City had made its first attempt to incorporate the Union Pacific lands as part of the municipality. In 1892 Kansas City again attempted to take these same lands into the city, resulting in the instituting of the present suit, in the State Court, calling in question the law of 1891, both as being in conflict with the State and Federal Constitutions.

As far as the alleged conflict with the State Constitution is concerned, that question of course was eliminated from the case by the decision of the Kansas Supreme Court. So that the one question now left is whether the paragraph in the law of 1891 reading:

"but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation," vitiates the entire law by reason of making it in conflict with the Fourteenth amendment to the Federal Constitution forbidding a state to deny "to any person within its jurisdictions the equal protection of the laws," or "to deprive him of his property without due process of law."

ARGUMENT.

It is our contention in the first place that the decision of the Supreme Court of Kansas under the facts in this case does not involve a federal question and therefore is not reviewable by this court.

Second, if the court is of the opinion that there is a federal question involved, then it is our contention that the part of the law under consideration which it is claimed is repugnant to the constitution, can be separated from the unobjectional part and can be disregarded and the remaining portion of the law can be enforced in accordance with the true intent of the legislature in enacting the same.

Third: There being no allegations in the plaintiffs in error's petition filed in the *nisi prius* court of any pay-

ment or offer to pay the taxes admitted to be due, defendant in error contends that said plaintiffs in error were not in a position to maintain this suit and the demurrer to their petition was properly sustained for that reason.

The decision of the Supreme Court of Kansas does not involve a federal question and this Court therefore does not have jurisdiction to review the same.

As to our first contention, we desire to urge two reasons why it should be sustained. First, because the plaintiffs in error, not being affected by the only provision of the law under consideration to which any objection, as to its constitutionality, is made can not be heard to complain, as the law so far as they are concerned does not take any of their property without due process or deny them the equal protection of the law. And second, because the decision of the Supreme Court of Kansas was the mere construction of a State Statute, which was the exclusive province of that court. Said construction being such that as to the plaintiffs in error no provision of the federal constitution was infringed.

Plaintiffs in Error are not in a Position to Question the Constitutionality of the Law Under Consideration.

"One claiming that a state statute is void for want of due process of law, is limited solely to the inquiry whether in the case presented by himself, the statute has operated to deprive him of his property without due process; and the court will not consider whether, in a different case, the act might so operate." Del Castillo vs. McConnico, 168 U. S., 674; 18 S. Ct. Rep., 229.

The Supreme Court of Kansas in the opinion rendered in this case says:

"The contention of the defendants in error, (plaintiffs in error here) was that the act providing for the extension of the city boundaries discriminates between classes of real estate owners and is therefore violative of that part of the fourteenth amendment to the Constitution of the United States which prohibits the State from depriving persons of property without due process of law, or denying to persons within their jurisdiction the equal protection of the law. This contention is based upon the exemption forming the last clause of the statute quoted: "But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation." So far as this statute discriminates between classes of owners of agricultural lands, the defendants in error can not be heard to complain.

Their lands are not agricultural lands; at least they do not allege them to be such lands, but, on the contrary, allege that part of them are used for railroad purposes, and that the remaining portions are vacant and unoccupied lands, and possessed for railroad purposes. Owning no agricultural lands, the defendants in error are not effected by the discrimination which the statute make between the different classes of owners of such kinds of lands, and they cannot therefore be heard to complain on that score.

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not effect, and who has no interest therefore in defeating it." Cooley's Constitutional Limitation, 6 ed. 196."

The plaintiff's in error have failed to bring to the attention of the Court any authority that controverts the law as laid down by the Kansas Supreme court in the above quotation. They, however, contend that the railroad company is effected by the law although its lands are not used for agricultural purposes, because it is sought to take them into the city under what they claim is conceded by the court, to be a void law.

Instead of the lower Court conceding that the law is unconstitutional by its decision it certainly decides exactly the contrary. The Court at least inferentially

holds that the portion of the law against which plaintiffs in error complain, is separable from the remainder of the law and that the unobjectionable part can and should be enforced. Of this, however, we desire to speak hereafter. The decisions are numerous in which the principles laid down by the Supreme Court of Kansas are upheld. In the case of Lowndes County vs. Hunter, 49 Ala., 507-509. The clerk of the Court brought suit against the county to recover for his services in completing certain records that former clerks had left uncompleted. The county defended on the grounds that a certain provision of the law that gave to the county a right of action on the delinquent clerks bound for the amount it may have to pay the present clerk for his work, was unconstitutional. The Court says:

"In the view we took of the case it is not necessary for us to express an opinion on the validity of the clause of the statute authorizing suit on the bond of the officers whose delinquency resulted in subjecting the county to liability for the completion of records which he ought to have completed. Neither the right and duty of the appelled nor the liberality of the appellant, is deducted from that clause. The concision of its unconstitutionality would not vitiate the proceeding, part of the statute rendering it the duty of the clerk to

complete the records, and making his compensation a county charge."

In another case, Smith vs. Inge, 80 Ala., 283-286, where a suit as brought by the Superintendent of wharves an officer of the Port of Mobile against several parties to eject them from certain premises claimed as wharf property, it was claimed that certain acts of the legislature desolving the municipal corporation of Mobile and creating the Port of Mobile was unconstitutional, because they took away all legal remedies from the creditors of the municipality for the collection of their debts, and that consequently an officer of the port of Mobile had no standing so as to maintain the suit in question. The Court in disallowing this contention, says:

"It is contended, however, that the acts of February 11, 1879, and December 8, 1880, including the whole system of legislation abolishing the charter and dissolving the municipal corporation of Mobile, are enactments which are void for repugnancy to the constitution because they impair the obligations of existing contracts by destroying all remedies of creditors of the city for the enforcement of their demands. It is manifest that this objection can be raised only by some actual creditor whose rights are claimed to be invalid. The defendants in this case are not shown to be credi-

tors and as to them the enactments in question are entirely free from constitutional objections."

In the case of People vs Rensselear and Saratoga Railroad Company, 15 Wendell, 113-130. A suit had been brought in the name of the State against the Railroad Company to compel it to show cause why it was doing certain things in the construction of a bridge that was claimed obstructed a navigable river. The Court says:

"The People of New York are plaintiffs in this case, and by this proceeding have called upon the defendants to show, by what authority they assume to do certain acts. It would in ordinary cases, be sufficient for the defendants to show that their acts are authorized by the authority of the law and of plaintiffs. Such an answer is sufficient in this case; and the defendants can only be properly called upon to answer to some person or persons entitled by a license to navigate the river to compensate in damages for obstructing the navigation or by some proceeding on the part of such persons to abate the nuisance if the bridge is such."

In another case, State vs. Clarke, 54 Mo., 17-36, the city of St. Louis had passed a certain ordinance authorizing the licensing of bawdy houses and a person holding such a license had been arrested under the State law and had in defence of the charge introduced

their city license. The State had objected to this, among other reasons, because the ordinance of the city providing for this license contained provisions that it was claimed infringed the State Constitution. The Court in answer to this says:

"If there are provisions in this ordinance, Chap. 14, which infringe on the rights of citizens, male or female, protected by the constitution and laws of the State, and such provisions are attempted to be enforced, the remedy is obvious. But even according to the case referred to in 1 Gray, it is not pretended that unconstitutional provisions in a law make it totally void. On the contrary, it is well settled, that they do not, and that a law may well stand, so far as it is constitutional, although it has in it certain provisions which are not valid. And in this case the only question was, whether the defendant's license under the ordinance was a protection. No question concerning the medical examination provided for in certain sections of the ordinance, arose.

No complaint on this subject was made by any one affected by the provisions said to be oppressive and in opposition to our bill of rights."

In the case of Pittsburg C. C. and St. L. Railroad Company vs. Montgomery, 49 N. E. Rept., 582-587, the constitutionality of an employer's liability act was under consideration. The act made all corporations except municipal liable for the negligence of a co-em-

ployee. The Supreme Court of Indiana held the law good as to railroads on the strength of the decisions of this court in the cases of Railway Company vs. Mackey, 127 U. S., 205, and Railway Company vs. Herrick, 127 U. S., 210, but it was urged that the law must fall because other corporations whose business was not as hazardous as railroading were included, the hazardousness of the business being the principal reason why the law as to railroads was sustained, and also because municipal corporations were excepted. The Court in its opinion dispose of these objections as follows:

"Objection is made to validity of the act because it embraces all corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that their business may not be peculiarly dangerous to life or limb, like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant railroad corporation, cannot be premitted to litigate the constitutionality of the act as to other corporations. Henderson vs. State, 13 Ind., 552; 36 N. E. 257. Board v. Reeves, 148 Ind., 467; 46 N. E., 995. Currier v. Elliott, 141 Ind., 394; 39 N. E., 554. It will be time enough to decide its validity as to other corporations when any of them come before this court with a case presenting the question.

It is also urged, as an objection to the validity of the

act, that it exempts municipal corporations from its operation. But no reason has been suggested why municipal corporations should be classed with railroad corporations. We have many statutes applying to railroad corporations that do not apply to municipal corporations. There is no necessary similarity between them. Nor is the business of municipal corporations so peculiarly hazardous to their employes as to call for such special legislation as is called for in case of railroad corporations to protect their employes. We therefore conclude that the act does not violate the constitution, either federal or state."

There are numerous other decisions and citations from text books that enunciate the same doctrine but these are sufficient to show that the principle laid down by the Supreme Court of Kansas is of wide acceptance.

The Construction placed of a State Statute by the Supreme Court of Kansas is Binding on this Court and Cannot be Reviewed.

As to our second contention under this branch of the law, the Supreme Court of Kansas in construing the statute of 1891 holds that the portion of the act alleged (see page 6 of record) to be in conflict with the constitution of the United States, is severable from the rest of the act. That the plaintiffs in error cannot question the validity of the whole act because the case they present does not come within the terms of the one portion

Since the printing of our brief the following cases have come to our attention:

"No one can take advantage of an unconstitutional provision of a law who has no interest in it and is not affected by it."

State *vs.* McNulty, 73 Mo., 87.
Jones *vs.* Black, 48 Ala., 540.
Board of Com'rs *vs.* Reeves, 148 Ind., 467.

of the law, which they challenge in their petition and assignments of error as unconstitutional. The plaintiffs in error are complaining of the construction placed by the Supremt Court of Kansas on the law in this case. The construction so placed on the statute in question is final, and this court will not review or reverse it, even if it is not correct. The correctness of our contention is best shown by the decisions of this court in similar cases.

In the case of St. Paul, Minneapolis & Manitoba Rly. Co. vs. Todd County, 142 U. S., 282, it was held that a decision of the Supreme Court of the state, exempting the property of a railway company from taxation, *but deciding that a certain class of property did not come within the terms of exemption*, is not an impairment of the contract by the laws of the state, and is not subject to review on error in the Supreme Court of the United States. In the opinion in this case by Mr. Chief Justice Fuller, it said:

"It is conceded the Supreme Court of Minnesota did not base its decision on the ground that there was not a valid contract between the state and the company, exempting its property from taxation, but held that the exemption claimed did not attach to these lands, and it is argued that if such lands are within the contract of exemption contained in the company's charter, then the obligation of that contract was impaired by the

assessment under chapter 11 of the general laws of the state, and the decision of the Supreme Court holding that the lands were subject to assessments under such laws. Our jurisdiction cannot be maintained upon this view, as is stated by Mr. Justice Gray speaking for the court in New Orleans Water Works Company vs. Louisiana Sugar Refining Company, 125 U. S., 30.

"'In order to come within the provisions of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract be impaired, but it must have been impaired by a law of the state, the prohibition is aimed at the legislative power of the state and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals, and the language of Mr. Justice Miller in exposition of the rule is quoted from two opinions of the court delivered by him."

"It must be the constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States, *and the decision of the state court must sustain the law in the matter in which the conflict is supposed to exist*, or the case for this court does not arise."

In the case of Central Land Company vs. Laidley, 159 U. S., 103, it is decided that this court has no jurisdiction of a writ of error to a state court on the ground

that the obligation of a contract has been impaired when the validity of the statute, under which the contract was made, is admitted, and the only question is of its construction by that court.

In this case Justice Gray, delivering the opinion of the court, said:

"The power delegated to us, is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

In Winona & St. Peter Land Company vs. Minnesota, 159 U. S., 526, in which the opinion was delivered by Justice Brewer, it was claimed that the provisions of Ch. 5 of the Laws of Minnesota of 1881, providing for the collection of back taxes, were void, the defendant complained of taxes levied against its real estate, and argued that the provisions of the law in question, relative to the collection of unpaid taxes on personal property were void as being in conflict with the Constitution of the United States, and that the provision of the law relative to the collection of unpaid taxes on real property were also void. The Supreme Court of Minnesota held that the provision of the statute with reference to the real and personal property were separable, and that the provision of the statute, with refer-

ence to real property were valid, and could be enforced even though the provisions of the statute, with reference to personal property, were void. In the opinion it is said:

"The Supreme Court of the state was of the opinion that even if the tax on personal property was not collectable under the provisions of the tax law for the reason claimed, yet there was at least a valid tax which, in the absence of any law providing another method, might be enforced by an ordinary personal action. * * * "

"It may well be that the legislature, in view of the probabilities of the changes in the title or situs of personal property, might deem it unwise to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. *At any rate if it did so, it violates no provision of the federal constitution, and whether it did so or not was a matter to be determined finally by the Supreme Court of the state.*

In Noble vs. Mitchell, 164 U. S., 367, the court had occasion to consider a statute of the State of Alabama regulating the subject of fire and marine insurance within the state. The state court held that the provisions with reference to this subject were separable, and that construing the different laws of the state regulating the business of insurance by foreign corpora-

tions, and that so construed there was no conflict between the statute and the Constitution of the United States. In the opinion, on page 371, it is said:

"The action below was predicated upon the fact that the business of insurance had been done by foreign corporations, the Supreme Court of Alabama in interpreting the statute held the provision as to foreign corporations was distinct and separable from those concerning associations or partnerships. It said: 'It is contended, however, by Secs. 1207 of the code, *supra*, these provisions of the law are made to include associations and partnerships as well as corporations, and in this respect discriminates against citizens of any state who may compose such partnerships, and in this respect is violative of the constitutional provision which declares that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.'

"We construe Sec. 1207 as amendatory of the sections to which it refers, so as to substitute the words corporations, associations or partnerships, for the words insurance company. Thus considered Sec. 1205, *supra*, would read as follows: any person who solicits insurance on behalf of the corporation or partnership not incorporated by the laws of this state, etc., and Sec. 1206, *supra*, would read: any person acting as agent for any foreign corporation, association or partnership which have, etc.' "

"By holding Sec. 1207 as amendatory of the other sections referred to in a manner declaring Secs. 1205

The question as to whether the provisions of the statute were separable was presented to and considered by the supreme court of Kansas in passing upon the demurrer to the plaintiff's petition on the first appeal, and was not open for review on this appeal.

"Questions which were open to dispute, and which were either expressly or by necessary implication decided on the first appeal of a cause, are not open for review on a second appeal."

McKinney *vs.* State, 117 Ind., 26.
Crockett *vs.* Gray, 31 Kans., 346.
Headley *vs.* Challiss, 15 Kans., 602.
Central Branch U. P. R. R. Co. *vs.* Shoup, 28 Kans., 394.
Jones Stationery & Paper Co. *vs.* Western News Co., 30 Kans., 334; *id.*, 150.
Humphrey *vs.* Baker, 103 U. S., 736.
Brown *vs.* Pontiac Min. Co, 67 N. W., 546.
Oregon R'y & Navigation Co. *vs.* ——, 1 Wash., 195.
Fenton *vs.* Salt Lake Co, 7 Pac., 409.
Stump *vs.* Hornback, 109 Mo., 272.
Cramer *vs.* Stone, 38 Wis., 259–262.
Ferguson *vs.* Smith, 104 Ind., 246.

and 1206 are separable in their provisions, and so far as they are made to apply to and are enforced against foreign corporations, they do not contravene any provisions of the state Constitution or the Constitution of the United States. *This construction of the Alabama statute, although made by the Supreme Court of that state, is erroneous, and we are invited to disregard it but the interpretation of a statute of the state of Alabama by the Supreme Court thereof, under the circumstances here presented, is binding on us.*"

If the Court Decides that there is a Federal Question Involved in the Decision of the Kansas Supreme Court the Alleged Unconstitutional part of the Kansas Statute can be Disregarded and the Unobjectional part Enforced.

Plaintiffs in error claim that the classification made by the Kansas statute puts lands used for agricultural purposes and owned by individuals in one class and all other lands in another, permitting the latter class to be taken into a city and refusing to permit the former. The section of the statute in question reads as follows:

Section 1. That whenever any territory adjoining or touching the city limits of any city of the first class

having a population of 30,000 inhabitants or more shall be subdivided into lots and blocks or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated to be bounded on three fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city or by both, the same may be added to and made a part of the city by ordinance duly passed; which ordinance shall describe the territory by giving the name of the subdivision or addition as platted, and by giving the metes and bounds of such unplatted tract, by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in, with the section, town, range and county in which the same is located, without further proceedings; BUT NOTHING IN THIS ACT SHALL BE TAKEN OR HELD TO APPLY TO ANY TRACT OR TRACTS OF LAND USED FOR AGRICULTURAL PURPOSES WHEN THE SAME IS NOT OWNED BY ANY RAILROAD OR OTHER CORPORATION."

It is plain from this section that the intent of the legislature was to divide lands into two classes, those used for agricultural purposes and those not so used and the last sentence, "WHEN THE SAME IS NOT OWNED BY ANY RAILROAD OR OTHER CORPORATION," is added by way of an exception from the class used for agricultural purposes, and was probably added as an amendment after the law had been prepared. If this exception was stricken out all the objections urged against

the law by plaintiffs in error would virtually be removed.

The right of the legislature to clasify the lands which are to be taken into the city and to say that certain classes of lands should be taken in, and that certain other classes should not, is not disputed. The only restriction is that the classification must be reasonable, and not arbitrary, but based on some difference as stated by Mr. Justice Brewer in Rld. Co. vs. Ellis, 165 U. S., 65, which bears "a reasonable and just relation to the act in respect to which the classification is proposed." The classification in this case of all lands used for agricultural purposes in one class and all other lands in another is not arbitrary, but on the contrary is certainly based on reasonable grounds. The benefits which accrue to lands within the limits of a city, are such that they would be of no value whatever, to lands used for agricultural purposes. Police protection, access thereto by means of graded and paved streets, the benefit of street lights or city water are of absolutely no value to lands used for agricurtural purposes, while the increase in taxation which all those conveniences of modern city life necessitates, would be an almost insupportable burden to the owner of such lands.

It is urged that the same objection would obtain as well to vacant lands, but practically this is not so. It is

a matter of common knowledge that vacant lands situated with reference to large cities, as those which would be affected by the terms of the law of 1891, are chiefly valuable on account of their proximity to such a city, and the possibility or probability that they will become available as city property. The fact that such lands have the benefit of all these modern conveniences would enhance their value. In addition to this, from the standpoint of the City, vacant and unoccupied lands might become a rendezvous of tramps and vicious characters generally, and if situated within the limits of an incorporated city, and yet not a part of it, the police would be absolutely powerless to make arrests or in any way prevent the establishment of this nuisance in its very midst. There are as good reasons why lands on which manufacturing plants are situated, necessitating the gathering together of large numbers of men and the construction of large buildings where fires are liable to orginate, demanding the assistance of the fire department maintained by the city, if for no other reason, to prevent the spread to the adjacent property in the city. This is peculiarly well illustrated by the facts in this case. The Union Pacific shops and round houses consisting of several large buildings and its switch yards filled with cars are in the heart of the city, and liable at any time to call on the city for fire

protection. The Company's hundreds of employees are furnished easy access to the Company's property by the bridges, viaducts, and paved streets in its immediate vicinity and all are maintained by the city, but the company pays no part of the expense of maintaining the city government and is in no way subject to the city regulations for protection against fire or for the maintenance of order. These and many other reasons of a similar nature might have moved the legislature to have excepted agricultural lands and included vacant and all other classes of lands.

It is quite possible that some inequalities and hardships will result from this classification, but that would be so in any classification of which we could conceive. Mr. Justice McKenna in a very recent case, Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283, 18 Sup. Ct. Reporter, 598, says:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And, necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Is the classification as made by the Kansas Legislature, into lands used for agricultural purposes in one class and all others in another, so unreasonable, so un-

just and so arbitrary, that the court can say that the State of Kansas denies to any person the equal protection of the law? If the legislature had the right and has not offended against the fourteenth amendment by so classifying lands, then the law of 1891 can stand providing the last clause excepting from the classification of lands used for agricultural purposes, when owned by railroads or other corporations, is not so connected with and dependent on the other parts of the law as a condition, consideration or compensation, that it can be held bad and the other provisions enforced.

The Supreme Court of Kansas held, at least by inference, that this clause from the law of 1891, quoted above might be objectionable, yet, the Union Pacific Railway Company, its lands not being used for agricultural purposes, was in no way affected by this objectionable part and was therefore not in a position to raise the question of its constitutionality. In other words, that the objectionable part might be rejected and the remainder of the law enforced. Whether this could be done, to a great extent, depends upon the legislative intent. To illustrate, if the excepting of lands used for agricultural purposes when owned by railroads or other corporations from the general class of agricultural lands, which cities of the first class are not

permitted to take into the city limits by said law of 1891 was largely instrumental in the passage of, and intimately associated with the entire act as an inducement therefor; then the law would have to stand or fall, as an entirety. But if said exception was merely incidental, if the legislative intent was to pass a law providing a better way for cities of the first class to incorporate adjacent territory within the city limits, and the exception was without special import, for instance, an amendment ingrafted in the law, by some statesman who considered his special work life was "to down" railroads and other corporations, or by some friend of the Union Pacific Railway Company in the legislature, with a view to bringing the present suit, then the objectionable part could be disregarded without vitiating the entire law.

We have called attention to some events antecedent to the passage of the law of 1891, and of which the court may properly take judicial notice, and which we think may properly be considered as showing the why and wherefore of the passage of said law. A law somewhat similar to this had been a part of the laws of Kansas, relating to cities of the first class for years, and when the decision of the Supreme Court in Union Pacific Ry. Co. vs. Kansas City, *supra* brought out its weak points, the legislature at its next session amended

it. The law is general in its nature, and had for its purpose to afford an expeditious and effective way for a city of the first class to incorporate adjacent territory within the city limits.

Chief Justice Shaw in Warren vs. Charleston, 2 Gray, 84, quoted with approval by this court in the income tax cases, 158 U. S., 601, says the unconstitutional part of the law and the balance of a law in order to be void, must be "so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole and that if all could not be carried into effect, the legislature would not have passed the residue independently."

What "condition, consideration, or compensation," is there between the other parts of the law in question in this case and the clause excepting lands used for agricultural purposes when owned by railroad companies, or other corporations from other agricultural lands. The "conditions, considerations or compensations" between the different parts of a law referred to as prohibiting the sustaining of a part and rejection of the remainder is well illustrated in Sluson vs. City of Racine, 13 Wisconsin, 398, cited by plaintiffs in error in their brief. Certain farming lands were attached to the city of Racine by act of the legislature and the con-

stitutionality of the act was under consideration. It was claimed that part might be permitted to stand and part, virtually conceded to be void by reason of being in conflict with the constitution, rejected. The court held the contrary, quoting the rule laid down by Chief Justice Shaw, cited above and explained the reason why it applied in that case. The Court said:

"The first section of the act (Chap. 83, Pr. Laws, of 1856,) provided that the tracts in question shall be annexed to the city. The second defines the new boundaries of the city, and then follows a proviso that the farming and agricultural lands annexed should be exempt from certain taxes, and should be taxed for city and ward purposes only at the rate of one-half of one per cent. There is no doubt that in many instances by the annexation of farming lands to a city, hardships are inflicted upon their owners by the increased rates of taxation to which they are subjected. If they are annexed, they must be taxed as other lands in the city, and that is a matter proper to be considered by the legislature in determining whether they shall be annexed. In this act it is evident the legislature had it under consideration, and that they annexed these lands with the idea that they might protect them against such hardships by a proviso for a less rate of taxation. The proviso was clearly intended as a compensation for the annexation and stronger language could not be well selected to show that the legislature intended the one to be subject to the condition stated in the other,

and that they would not have annexed these lands unless they had supposed that effect could be given to the proviso. For these reasons we think the principle stated applies, and the act should be held inoperative."

The connection between the good and bad parts of the law in this Wisconsin case, is very apparent, but we fail to see any similar relationship between the parts of the act under consideration, and certainly the plaintiffs in error have failed to show any.

Mr. Cooley in his work on Constitutional Limitations, page 210, says:

"A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the

provisions are connected in subject matter depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. *The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last may fall. The point is not whether they are contained in the same section; for the distributions into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordauce with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.*"

Supposing the clause in the Statute, under consideration, excepting lands used for agricultural purposes owned by any railroad or other corporation from the general class of lands, so used, and not subject to be taken into the city, was stricken out. The law would then certainly be complete in itself and could be enforced according to the legislative intent. Lands situated with respect to a city of the first class as those ennumerated in the law, receiving all the benefits of the various departments of the city, for protection against fire, etc., maintained by it at a heavy expense, could be

incorporated within the city and be made to contribute towards the benefits which they receive, excepting in case of lands used for agricultural purposes, owned by railroads and other corporations. To that extent the legislative intent being in conflict with Federal Constitution could not be carried out. But that is but a very small portion of the act and when rejected the entire purpose of the law, can still be accomplished without the slightest hindrance by reason of the rejection of this unimportant provision.

The Supreme Court of Colorado in the case of People ex rel. Seeley vs. Hull Jr., Treasurer, 8 Colorado, 485, 9 Pacific Reporter, 34, had under consideration a law of that state entitled "An act to provide for the payment of county and road taxes in cash and to repeal all laws in conflict therewith." In the body of the law it provided:

Section 1. All property taxes levied for county purposes and for road purposes together with all penalties and costs thereon shall be payable in cash only, *provided* whenever the market value of such warrants shall be less than their par value, it shall be the duty of the county treasurer of the county to credit the cash so received, to a special fund which fund shall be used for the purpose of buying any outstanding county or road warrants respectively at the lowest price not exceeding par at which the same or any part thereof may

be offered to the county treasurer: *Provided further*, the county commissioners may by resolution set aside not to exceed twenty-five per cent of the money so collected for the purpose of creating a special contingent fund. *Provided further*, that said sum shall not be used for the payment of any outstanding warrants, or for the payment of any salaries or fees of officers or for any purpose whatever except in payment of purchases of supplies for county purposes hereafter made, etc.

This law or all the provisos were claimed to be unconstitutional because they were repugnant to the provision of the constitution of the state requiring the title of a law to state the purpose of the act. The Court in sustaining this contention says:

"The specific objection to which our attention is directed under the first question above stated, is that the portion of the act designated therein relates to a subject in no way mentioned or coveyed by the title, and, therefore, that it is in conflict with Section 21, Art. 5, of the constitution. Other exceptions are taken to the provisions in question, but, inasmuch as we deem this one decisive, they will not be discussed. The title of the act is as follows: "An act to provide for the payment of county and road taxes in cash, and to repeal all laws in conflict therewith." The first three lines of section 1, declares that "all property taxes levied for county purposes and for road purposes, together with all penalties and costs thereon, shall be payable in cash only." The third and last section specifically repeals two ex-

isting provisions which authorized the payment of such taxes in county warrants, and then concludes with the usual general clause repealing inconsistent acts and parts of acts.

The foregoing are the only portions of the statute which can possibly be considered as covered by the title. The remainder thereof treats of subjects wholly disconnected from that of the payment of county and road taxes in cash. No learning or ingenuity can satisfactorily demonstrate that clauses providing for the disbursement of funds in the treasury are embraced within a title which is expressly confined to the COLLECTION of such funds. It requires no argument to show that provisions relating to the purchase of outstanding warrants at their market value, setting aside for a special purpose 25 per cent. of funds in the treasury, advertising for sealed propositions of sale from the holders of the warrants, canvassing such bids by the county commissioners, and the like, are not germane to the subject mentioned. This conclusion, however, does not necessarily render void the portion of section 1 above quoted. It and the repealing clauses are clearly, as already observed, within the purpose expressed in the title. They do not in any way depend upon the other parts of the act, and are complete in and of themselves. In view of the latter part of the constitutional provision referred to, as well as under a familiar rule of statutory construction, it is our duty to hold that while all the provisos of section 1 and all of section 2 are void, the remainder of the act is perfectly valid."

In the case of Lowndes County vs. Hunter, 49 Ala., 507-509, *supra*, it was virtually conceded by the court that the provision of the law under consideration to the effect that the county could recover from the former clerk and his bondsmen the amount said county was compelled to pay for completing the records which said former clerk had left unfinished, was unconstitutional, but notwithstanding this fact the remaining parts of the law were held good and were enforced. It could have been contended with great plausibility that the legislature would not have passed a law imposing the burden upon the county for doing the work that former clerks should have done, unless the amount could have been recovered from the delinquent clerks and their bondsmen. The Court says:

"The rule is that if some of the provisions of a statute are violative of the constitution, while others are consintent with it, the latter will be maintained if they can be separated from and stand without the unconstitutional parts of the law. The Courts will treat the unconstitutional parts as if they were stricken out of the statute. Mobile & Ohio R. R. Company vs. State, 29 Ala. 373; *ex parte* Pollard, 40 Ala. 77. In the application of this rule it is not material that the constitutional and unconstitutional provisions are mingled in the same section as they are said to be in this statute. The division of statutes into sections is purely artificial; and one section may and often does

contain provisions distinct and separate. The inquiry is, not as to location of the several provisions, but whether they are so essentially and inseparably connected, that if the unconstitutional provision is stricken out, that which remains is not complete in itself and capable of operation according to the legislative intent. Cooly's Con. Lima. 177-9, Mayor and Council vs. Dechest, 39 Md. 369.

In the case of Turner vs. Commissioners of Woodson County, 27 Kansas, 314-317. A section of a statute authorizing the voting of bonds in aid of railroads was declared unconstitutional and it was contended that the entire law thereby should fall. The section declared invalid provided for setting aside the tax collection from any railroad to which a township had voted bonds for the use and benefit of that township. The Court while acknowledging the unconstitutionality of the section complained of, yet held the remaining portions of the law were valid and binding. Mr. Justice Brewer, then Associate Justice of the Supreme Court of Kansas, disposes of the claim in a very few words:

"Neither do we see any force in the last objection. It can not be seriously contended that the invalidity of this section renders the balance void. That is perfect and complete by itself, and does not depend at all upon

the objectional portion of this section. (Cooley's Const. Lim. 177 to 181.")

The connection between the two parts of the law in the 27th Kansas case were much nearer than can possibly be in the case at bar. In the former case a law which authorizes the electors of a township to vote bonds and thereby place on themselves an onerous burden, as a sort of compensation, gave to such township the taxes collected from said road in the township. And it could be argued with force that this would be an inducement to favorable action by the voters when deciding whether to place this burden on themselves, but in the case at bar nothing of that kind exists.

The case of State ex rel. Monnett, Attorney General vs. Baker, Ohio 44, N. E. Rept., 516, is similar to the case at bar in that the objectional part of the law was an exception. The legislature passed a law creating a class of cities for the purpose of municipal government. It included all cities, which according to the federal census of 1890 or any subsequent Federal census shall have a population of not less than 27,000 or more than 34,000 EXCEPTING CITIES OF THE SECOND CLASS, THIRD GRADE "a." The class of cities second class, third grade "a" had been created by a previous enactment

and included cities having a population of more than 28,000 and less than 33,000. This exception was held by the Supreme Court of Ohio to be unconstitutional, but said Court refused to declare the entire law invalid, by reason thereof. The Court says:

"Hence the question in this case resolves itself into this, whether the exception of third grade "a," invalidates what, under the previous decisions of this court, would otherwise be a valid classification of cities for the purpose of organization and government. We think not. Third grade "a" was formed by an act adopted March 5, 1891, (88 Ohio Laws, 77), and included all cities having a population of more than 28,000 and less than 33,000 inhabitants on the first day of July, 1890, as ascertained by the last Federal census, so that cities of this grade would be included in the class in question. Now, if it was not competent to the legislature to make this exception to the class formed April 20, 1893, then it is no exception, and the class then formed will include all cities in the state within the limits of the population named; for it was entirely competent for the legislature to make a class that would include all the cities of the state having a population of not less than 27,000 and not more than 34,000 inhabitants. Now can we infer that, if the legislature had known that the exception could not be made, the act without the exception would not have been adopted? We should rather infer that, in the judgment of the legislature, there was a necessity for such a class,

superior to its creation with an exception of the third grade "a," and it made the exception in a mistaken apprehension as to its powers."

In the case of The State ex rel. Cornish vs. Tuttle, 53 Wis., 45-50, the legislature had incorporated in the charter of the village of Whitewater, Wisconsin, a provision requiring a person who was otherwise a qualified voter to have resided in such village twenty days before an election to be entitled to vote at such elections. This provision of the charter was held to be unconstitutional and it was then claimed that the entire charter must fall by reason of this provision having been declared void. The Court in declining to adopt this view says:

"But because the charter of the village of Whitewater contains this void provision, it by no means follows that the whole act of incorporation is void. Strike out the void part, and the charter still contains valid provisions amply sufficient to enable the municipality fully to perform all of its functions. The rule in such a case, frequently asserted by this Court, is that unless the void part was compensation for or inducement to the valid portions, so that the whole act, taken together, warrants the belief that the legislature would not have enacted the valid portions alone, such portions will be operative. Slauson vs. Racine, 13 Wis., 398; State ex rel Walsh vs. Dousman, 28 Wis., 541;

Dells v. Kennedy, 49 Wis., 555. See also cases cited in the brief of counsel for defendant. Municipal corporations constituted a most important feature in our system of government. By them and through them the local and prudential public affairs of large communities are administered. They are the agencies of local self-government, easily reached and influenced by the people for the general good. So important were these corporations regarded by the framers of the constitution that they inserted in that instrument an express mandate to the legislature to "provide for the organization of cities and incorporated villages." Article XI, Sec. 3. Since the adoption of the constitution, the legislature has, in obedience to such mandate, created numerous municipal corporations, and has enacted a general law for the incorporation of villages. While it is true that quite a number of special charters contain restrictions upon the right to vote at municipal elections, similar to that in the charter of Whitewater, yet in very many of them no such restriction is found. Neither is it found in the general law for the corporation of villages. R. S. 291, Sec. 873.

Considering that it is thus made the duty of the legislature to provide for the organization of municipal corporations, and that this duty has been performed in so many instances without inserting in the acts of incorporation the invalid restriction under consideration; and considering also that there is no apparent reason why the legislature should deem it more important to restrict the right to vote in Whitewater than many other municipalities of the state where no such restriction

has been attempted, it seems very clear to our minds that the void part of section 4 of the village charter was not the inducement to, or consideration for, the enactment of the valid portion of the charter. On the contrary, we have no doubt that the legislature would as readily enacted the valid portion of the act, had the void provision been wholly omitted therefrom."

It seems to us that the language of the Wisconsin Court is very much in point in this case. It is incredible that the legislature of the state of Kansas could have been induced to, or to the sligthest degree have been influenced in passing a law of as much importance to the cities of the first class, comprising all the larger municipal bodies in the state, as the one under consideration by the question of whether lands used for agricultural purposes owned by railroads or other corporations should be taken in or not. Without some provision of the kind embodied in the law 1891, a city would become hidebound. A person who had vacant lands living in the city or adjacent to it, and enjoying the benefits of city improvements but either because he wanted to hold his property for speculation or because it was used for some special purpose as in this case, and it was desired to escape the increased taxation and restraints of city control, could check and hamper the growth and well being of a city to an unlimited degree,

unless there was some way to take such lands within the city limits without the consent of the owners.

See also on this point Road v. McCarger, 40 Cal., 177.

Packet Co. vs. Keokuk, 95 U. S., 80.

Robinson vs. Bidwell, 22 Cal., 379.

The People vs. Kenney, 96 N. Y., 294-302.

Donnersberger vs. Pendergast, 128, Ill., 229.

Bank vs. Hines, 3 Ohio St. 35.

Santo vs. State, 2 Iowa, 164-205.

Authorities on this question could be multiplied *ad libitum* but while the principle is easily stated its application is much more difficult and to a certain extent the Court called upon to decide a case of this kind may properly take into consideration the surroundings and the purpose to be accomplished by a law as bearing on the probable intent in its passage. Under the circumstances we submit that the law in question was enacted for the purpose of faciliating the exercise of the very important right of the city to increase ite boundaries when the proper occasion arose and that the excepting of lands used for agricultural purposes owned by railroads or other corporations from the general class of lands used for agricultural purposes was the merest incident that can be disregarded and the remaining portions of the law enforced.

The petition is demurrable for the reason that it does not contain any allegation of payment or tender by the plaintiffs in error of taxes shown by the petition to be lawfully due.

The plaintiffs in error filed their petition in the Court of Common Pleas of Wyandott county, Kansas, asking that the taxes assessed by Kansas City and the school board of Kansas City against the lands of the Union Pacific Railway Company, for city and school purposes, be enjoined for the alleged reasons that the law under which such lands had been taken into the city was unconstitutional, and therefore said city and school taxes were levied without authority of law and were illegal and void. (Rec., p. 7.) They also alleged in their petition that the State Board of Railroad Assessors of Kansas, the Township of Wyandotte and School District No. 9 had levied certain taxes against the property of said Railroad Company, (pp. 11-12-13, Record,) but there is no allegation that the State or County taxes, or the taxes levied by the State Board of Railroad Assessors, Wyandott Township, or School District No. 9, had been paid or tendered, although no complaint is made as to the State and County taxes or the levies of the State Board of Rail-

road Assessors and the levies of Wyandotte Township and School District No. 9, are alleged in said petition to be correct and that said plaintiffs stand willing and ready to pay them. (Rec., p. 13.)

It is the contention of the defendants in error that plaintiffs in error could not maintain this suit and that the demurrer to their petition was rightfully sustained for three reasons. First, because there is no allegation of a tender of the taxes levied for State and County purposes. Second because there is no allegation of a tender of the taxes levied either by the defendants in error Kansas City and school board of Kansas City or the Township of Wyandotte and School District, No. 9, and third because no tender of any part of the taxes levied by the State Board of Railroad Assessors or Wyandotte Township is alleged.

First—There is no allegation or tender of the taxes levied for state or county purposes. The correctness of the assessed valuation of the property is not disputed, and no complaint is made as to the rate of taxation for state or county purposes. The petition should contain an allegation of the payment or tender of the state and county taxes, and without it is fatally defective.

Under the laws of Kansas, a person must pay all his taxes, or one-half of all of the same at one time, and

can not pay, nor can the county treasurer lawfully receive payment of any particular tax or taxes, leaving some particular tax unpaid.

In Julien vs Ainsworth, 27 Kan., 446, the plaintiff's total tax was $105.87. He disputed the validity of $19.00 of that amount levied to pay certain railroad bonds. He alleged in his petition a tender to the county treasurer of $86.87, the amount of his taxes less the railroad bond tax, and the treasurer refused to receive said amount. Mr. Justice Brewer, delivering the opinion of the Court said:

"The question presented is whether a tax-payer can at his option tender to the County Treasurer a part of the taxes assessed upon any specific property, and compel him to receive and receipt for such portion."

The law as declared in the syllabus of this case on this point is as follows:

"A taxpayer has no right to tender to a County Treasurer a portion of his taxes, and compel a receipt therefor. The treasurer may decline to receive such part tendered, or to give any receipt, unless the entire amount of the tax is paid, or the taxpayer exercises the option given by Section 91, of the tax law, of paying one-half thereof before the 20th day of December."

The proper practice and pleading in cases of this

character was pointed out by Justice Brewer in the opinion in this case at page 449. It is said:

"*If the plaintiff desires, as counsel say, to contest the validity of any particular tax or part thereof, his proper remedy is to tender the remaining taxes*, as he did in this case, and then bring his action for an injunction, keeping good his tender, and showing wherein the taxes not tendered are illegal, and no proper charge upon his property. Then if his claim of illegality is sustained, an injunction will be ordered restraining the collection of such illegal tax, and *the treasurer may then* receipt for such taxes tendered and admitted to be legal. In no other way can proper protection be secured to the officer and the public."

While the plaintiffs in error did not directly, by this action enjoin the collection of all taxes levied on the lands described in their petition *during the pendency of this case*, they did so indirectly, and as effectually as though they had sought to enjoin the state and county taxes as well as the city and township taxes.

The county treasurer is a defendant in error in this action. He represents the interest that the state and county have in the payment of the taxes due to the state and county. The state, county, and city are all affected by the failure of the plaintiffs in error to pay their taxes; are delayed in the collection of public revenues by the prosecution of this suit which involves but

a small portion of the total tax assessed against the property of the plaintiffs.

In the recent case of the Bank of Garnett vs. Ferris, 55 Kans., 120, in which case the tax levied against the bank and its stockholders was illegal because the assessors of Anderson County had discriminated against banks and their stockholders in fixing a basis of valuation for their property, the Court said:

"It is contended that a discriminating and illegal tax of this character cannot be enjoined; but in a case just decided it has been held that injunction is a proper remedy, and that a party who has tendered *all of the state taxes, and his share of the county and other local taxes, is entitled to have enjoined the collection of the illegal excess.* (C. B. & Q. Ry. Co. vs. Commissioners of Atchison Co., 54 Kans., 781.) *It does not appear that any portion of the taxes due upon the property was paid or tendered before these proceedings were instituted.*"

"No part of the *state tax* has been paid, and there is no charge that the state officers have been guilty of irregularities or wrong doing in respect to these taxes."

"If the parties had paid that portion of the tax about which there is no question, and such part of the remainder as could be readily ascertained to be a just tax upon a fair valuation, they would have been entitled to an injunction to prevent the collection of the illegal excess."

In the recent case of Franz vs. Krebs, 41 Kans., 233, which was an action to enjoin the county clerk from issuing a tax deed on a tax sale certificate on property of the plaintiff, and which certificate was claimed to be illegal, because a part of the tax, for which the property was sold, was an illegal special assessment, levied by the city of Atchison. The plaintiffs offered on the trial to make good the offer made in their petition as to the payment of the taxes conceded to be legal and due. The trial court found that the plaintiff failed to pay or tender the second half of her general taxes.

The Supreme Court of Kansas, in its opinion delivered by Chief Justice Horton, said:

"It is conceded that all taxes levied upon the real estate for which it was sold, were legal, *except the special macadam tax*. It had been frequently decided by this court that an action will not lie to set aside a tax sale certificate, *or restrain a tax proceeding*, without a prior payment or tender, of all the legal taxas admitted to be due and payable. In this case the amount of legal taxes are not in dispute, and therefore the rules applicable to other cases generally will be applied to this."

"Evidently the plaintiff was guilty of laches, in failing to pay or tender the second half of her *general taxes* admitted to be legal and due."

Second. The plaintiffs in error should have alleged a

payment or tender of either the city or township taxes levied on their property. It was taxable whether in the city or out of it. The valuation and rate of taxation was fixed and the tax due on either theory, as to the validity of the ordinance easily computed. The plaintiffs in error should have, if their property was in the city, paid taxes on it according to the rate of taxation fixed by the city authorities, if it was in Wyandotte Township, they should have paid according to the rate of taxation fixed by the township officials. They were bound to know, as a matter of law, whether or not their land was in the city or not, and to act accordingly.

The plaintiffs in error allege the taxes levied by the defendants Wyandotte Township and School District No. 9, on the land in controversy, not assessed by the Board of Railway Commissioners, are valid and that they were extended upon the tax rolls, (page 12 of Record.) and that the county treasurer "proposes to and will collect the amounts of said city and school taxes levied against said property as aforesaid."

The plaintiffs should not be allowed to escape payment of taxes for years by alleging that they do not know the location of their own lands with reference to the city limits, nor by alleging that there is a conflict between the municipal authorities as to which of them

have jurisdiction to tax such lands. This is especially true in this case where both the township and city authorities had levied a tax and an opportunity to pay, or at least to offer to pay on either basis of taxation, was presented.

The case of the Northern Pacific Railway Company vs. Clark, 153 U. S., 252, 14 S. Ct. Rep., was a suit by the Northern Pacific Railway Company to enjoin the collection of taxes alleged to be illegally assessed against its lands. The circuit court sustained a demurrer to the bill and dismissed it for want of equity. In this case the bill showed that the railway company was liable to pay taxes either on a percentage of its gross earnings or to pay a tax upon its land as other property of like character was assessed. The bill did not allege a tender of taxes on either basis of taxation. Mr. Justice Jackson, delivering an opinion of the court, said:

"Being liable to pay either a percentage on gross earnings in accordance with the provisions of the act of 1889, or a tax upon its land as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of these modes of taxation."

The recent case of Albuquerque vs. Perea, 147 U. S., 87; 13 S. Ct. R., 194, is decisive as to the effect of the allegations of the plaintiff's petition by which they seek to avoid the necessity of alleging a tender of the taxes admitted to be due. This case is in principle identical with this. Mr. Justice Brewer, declaring the opinion of the court, quotes from the petition of the plaintiffs the following, which is very similar to the allegations of the petition in this case:

"That the amount of its taxes upon the assessment as made by the board of equalization is the sum of $2,189, and that the amount of the assessment which your orator should justly pay for its said property, if lawfully, equitably, and justly assessed, would be the sum $1,532.30, which said sum your orator brings into court, and hereby tenders."

"And your orator further alleges that the said assessment and said tax roll are so made out that it is impossible to separate the property upon which your orator is justly and lawfully taxed, and the taxes upon which are justly and lawfully levied, from the balance of the taxes assessed against your orator; but whatever sum may be ascertained by the court to be justly due from your orator on account of taxes for the year 1889 your orator is ready and willing to bring the same into court and is ready to pay the same."

The defendants demurred to the bill in this case, and their demurrer was sustained, and the bill dismissed,

and this decision was affirmed by the Supreme Court of the Territory of New Mexico, and from this decision an appeal was taken. In the opinion, Justice Brewer, having stated the facts of the case, among other things, said:

"With respect to the taxes of 1889, there was no payment or tender of payment of any amount. Plaintiff seeks to avoid the necessity therefor by alleging that it is impossible to separate the legal from the illegal portions of the taxes—an allegation which is manifestly untrue—in view of the fact that it had no difficulty in making the separation in the taxes of 1888, the assessment for which was made in a similar way, and in view of the further fact that it must have known what property it had which was subject to taxation as well as its value, and therefore the rate of taxation being fixed by law, it could, of course, have known what amount was undoubtedly due. The rule in respect to this matter is perfectly well settled in this court. In State Railroad Tax Cases, 92 U. S., 575, 616, it was fully considered. In that case it was said by Mr. Justice Miller, speaking for the court: 'It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is a direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that

they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping that with which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full of all the taxes assessed.'"

Third. The petition shows that a portion of the lands included in the ordinance extending the city limits, was real estate owned by the Union Pacific Railway Company, and not used or necessary to be used in the daily operation of said railway, and therefore subject to assessment for taxation by the city or township authorities, and that another portion of the lands included in said ordinance was real estate assessable only by the State Board of Railway Assessors. The petition shows that the State Board of Railway Assessors assessed the lands assessable by them and included within the ordinance extending the city limits as though the same were in the Township of Wyandotte. The petition further shows (pages 10 and 11, record) that the total assessed valuation of the road bed, right of way and other property so asses-

sed by the State Board of Railway Assessors was $233,612.00, and that of this sum $110,968 was for lands included in the ordinance extending the city limits. Deducting the assessed valuation made on the lands included by the ordinance in the city limits from the total assessed valuation aforesaid there remains an assessed valuation of $122,644.00 on which there would be due to Wyandotte Township according to the rate of taxation shown by the petition $1,103.79, and to School District No. 9, $613.22, regardless of the questions involved in this case. The petition contains no allegation of payment or tender of this portion of the tax, the validity of which is admitted by the petition.

In Hagaman vs. Comm'rs of Cloud Co., 19 Kan., 394, an action to enjoin the assignment of tax sale certificates, in the opinion delivered by Chief Justice Horton, the law on this question as declared by this court is quoted and approved. It is said:

"No evidence was offered that the taxes were wholly illegal and void; neither was it alleged in the petition, nor proven on the trial, that the plaintiff had paid or tendered any part of the taxes. The defendants demurred to the evidence of the plaintiff. The court sustained the demurrer; and we are asked to reverse such ruling."

"Upon familiar principles, and by the repeated decisions of this court, the plaintiff is not rightly entitled to the relief demanded until he has done that justice, or offered to do it, which he exacts from others. He who seeks equity, must do equity. The action of the court in sustaining the demurrer was correct. (Gulf Rld. Co. v. Morris, 7 Kan., 210; Comm'rs of Leavenworth Co. v. Lang, 8 Kan., 284; City of Ottawa v. Barney, 10 Kan., 270; Challis v. Comm'rs of Atchison Co, 15 Kas., 49.) *To the suggestion of counsel for the plaintiff, that if the court found any of the taxes illegal, the judgment should have been for the plaintiff, conditioned upon his paying the legal tax, not that he had no case in court*, we cannot better reply than by using the forcible language of Mr. Justice Miller in Bailey v. A. & P. Rld. Co., C. L. J., vol. 1, 502, that, 'Whenever parties come into this court to ask this court to enjoin the collection of taxes, or the collection of part of a tax, if there is any part, which they admit to be due or just, or which the court can see in the statement made in the bill ought to be paid, there must be an allegation made in the bill conforming to the fact, that they have paid it; and it is not a sufficient allegation to come and say that, 'we have paid it into the court,' because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will not pay his taxes, or any portion of them, cannot screen himself during the course of a long litigation from paying that which must be paid, and which every body sees must be paid, by setting up a contest over that which is doubtful, and which may, or may not, be necessary to be paid.'"

The law of Kansas requiring a tender of the taxes due on the plaintiff's land, the demurrer of the defendant's should properly have been sustained on that ground. The sustaining of the demurrer therefore by the state court did not necessarily involve the consideration of any question of constitutional law, the demurrer could have been sustained without passing upon the constitutionality of the act in question. This court therefore has no jurisdiction over this case.

In Eustis vs. Booles 150, U.S., 362, it was decided as follows:

"To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it."

See also the following cases as sustaining our contention that a tender of the taxes legally due must be alleged:

Insurance Company of North America vs. Bonner, 49 Pac., 366.

Ottawa vs. Borney, 10 Kans., 270.

High on Injunctions, (3d edt.) secs. 497 and 498.

2 Beach on Injunctions, sec. 1208.

2 Dillon's Municipal Corporations, (4th edt.) sec. 914 and note.

We respectfully submit in conclusion that the plaintiffs in error have failed to establish their right to prosecute this appeal, that their appeal does not present a federal question, that the federal question which they claim is involved in this litigation, they are not in a position to take advantage of, and that having failed, to do equity in paying or offering to pay the tax admitted to be due, they cannot now even if their contentions are all correct, call on a court of equity to grant them relief, and we therefore ask that this appeal either be dismissed or that the decision of the Supreme Court of Kansas be affirmed.

T. A. POLLOCK,
City Counselor,

F. D. HUTCHINGS,
City Attorney.

Attorneys for Defendants in error.